

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BRIAN SETENCICH,

Plaintiff,

v.

THE AMERICAN RED CROSS, a non-  
profit corporation, STEVE BROWN,  
ROBERT BROWNING and DOES 1  
through 30, inclusive,

Defendants.

Case No. C07-03688 SBA

**[PROPOSED] ORDER GRANTING  
DEFENDANT AMERICAN RED CROSS  
BLOOD SERVICES SOUTHERN  
CALIFORNIA REGION'S MOTION TO  
DISMISS PLAINTIFF BRIAN  
SETENCICH'S FIRST AMENDED  
COMPLAINT**

**[F.R.C.P. 12(b)(6)]**

TO PLAINTIFF AND TO PLAINTIFF'S ATTORNEYS OF RECORD:

On February 12, 2008 at 1:00 p.m., there came on for hearing before the honorable Sandra Brown Armstrong, the motion of defendant American Red Cross Blood Services Southern California Region ("ARC") to dismiss plaintiff Brian Setencich's First Amended Complaint ("FAC") for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). Brian Setencich ("Plaintiff") was represented by Jill P. Telfer of the Law Offices of Jill P. Telfer. ARC was represented by Sabrina L. Shadi of Baker Hostetler LLP.

**I. BACKGROUND**

Plaintiff was recruited by the defendants in mid to late 2005 to work as the Communications Manager for the Blood Services, Western Region, Division of the American Red Cross, because of Plaintiff's "excellent communication skills and extensive experience of working with the public." (FAC, ¶¶ 2, 14). In this position, he would have been "working directly for Marc Jackson ("Jackson"), the Director of Public Affairs and Communications for the American Red Cross." (FAC, ¶ 2). Plaintiff and Jackson had met in the early 1990's, had "worked on several issues together," and after Plaintiff was elected to the State Assembly in 1994, he made Jackson his Chief of Staff. (FAC, ¶ 6). In 1997, Plaintiff became Special Liaison to the Mayor of San Francisco and Jackson began working for ARC in Southern California. (FAC, ¶ 6).

Plaintiff "interviewed and met with decision-maker's on approximately three occasions" and "received positive reviews from the hiring panel and decision-makers." (FAC, ¶ 15). Plaintiff "informed defendants that he had been convicted of filing a false tax return in 1997" and that "Defendants informed [him] that a criminal conviction is not an impediment to have and that numerous individuals with convictions had been hired in the past." (FAC, ¶ 25). According to Plaintiff, ARC employees made various statements to him "confirming he would be hired." (FAC, ¶ 25). Plaintiff believes, however, that "when defendants learned of Setencich's association with Jackson, who they were attempting to force out given his use of family medical leave, disability, and protected activity, they attempted to withdraw the decision." (FAC, ¶ 15). Ultimately, ARC did not hire Plaintiff. (FAC, ¶ 26).

**II. LEGAL STANDARD**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is proper when there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Such motions to dismiss should be granted when it is beyond doubt that no relief could be granted, under any set of facts, when the allegations are construed in a light most favorable to the pleader. *Helleloid v. Indep. Sch. Dist. Number 361*, 149 F.Supp.2d 863, 866-67 (D. MN 2001).

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Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Fernandez-Montes v. Allied Pilots Association*, 987 F.2d 278, 284 (5th Cir. 1993).

### III. ANALYSIS

#### A. Plaintiff Has Failed to State A Claim for Association Discrimination

Plaintiff's first cause of action alleges that a decision was made to hire him but "when defendants learned of Setencich's association with Jackson, who they were attempting to force out given his use of family medical leave, disability, and protected activity, they attempted to withdraw the decision." (FAC, ¶ 15).

While it is undisputed that FEHA prohibits discrimination based on association, the occasional and temporary business or social interactions between Plaintiff and Jackson are not the type of associations anti-discrimination statutes were aimed to protect. For example, in *Larimer v. International Business Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004), the court held that three types of situations are within the intended scope of the prohibition on discrimination based on association: "'expense,' 'disability by association,' and 'distraction.'" The court explained these categories as follows:

An employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.

*Id.* Plaintiff has not alleged and cannot establish that any of these categories provide the basis of alleged discrimination against him.

Moreover, even if the relationship between Plaintiff and Jackson were of the nature FEHA was intended to protect, the allegations in Plaintiff's complaint refute Plaintiff's conclusion that he was not hired as a result of his relationship with Jackson. Specifically, Plaintiff's complaint states that he was recruited for a position in which he would fill "an important need for Defendants" and "would be working directly for [Jackson], the Director of Public Affairs and Communications." (FAC, ¶ 2). Plaintiff further alleges that "Jackson needed the assistance of a Communication Manager to accommodate not only his disability, but the growth of the department and to counter the attempts of the defendants to undermine him and set him up to fail. Jackson found plaintiff to be the most qualified for the position, as did those on the hiring panel" (FAC, ¶ 16). Plaintiff's conclusion that ARC was making a concerted effort to fill the Communication Manager position to assist Jackson but then did not hire Plaintiff into the position because it was discriminating against Plaintiff for his association with, and ultimately in order to punish, Jackson, because of Jackson's disability does not follow logically from the facts alleged in the FAC. As the First Circuit Court of Appeals stated in *Aulson v. Blanchard*, 83 F.3d 1, 3 (1996), courts need not "swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupported conclusions, periphrastic circumlocutions, and the like need not be credited."

**B. Plaintiff's Claim For Fraud Is Not Pled With Sufficient Particularity**

Plaintiff alleges that "Defendants made specific representations that it intended to hire Plaintiff . . .", that "Defendants knew their statements were false at the time they were made" and that "Defendants, and each of them, decided not to hire Plaintiff for their own illegal reasons." (FAC, ¶¶ 24, 26).

Fraud actions are subject to strict pleading standards. In pleading a claim for fraud, the circumstances constituting fraud must be stated "with particularity." Fed.R.Civ.Proc. 9; *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000) (claims of fraud must be pled "with a high degree of meticulousness.") Specifically, Plaintiff must plead facts which show how, when, where, to whom and by what means the representations were made. *Standfield v. Starkey*, 220 Cal.App.3d 59, 73 (1990). If the defendant is a corporation, "the plaintiff must 'allege the names of the persons who made allegedly fraudulent misrepresentations, their

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1 authority to speak, to whom they spoke, what they said or wrote and when it was said or  
2 written.” *Lazar v. Sup.Ct.*, 12 Cal.4th 631, 645 (1996) (citations omitted). Here, Plaintiff’s  
3 allegations consist of broad statements regarding the intentions and conduct of “defendants” to  
4 hire him without naming any specific individual who made an express promise on behalf of ARC  
5 to hire plaintiff at any specific time or at all. Plaintiff’s allegations are vague and conclusory and  
6 are therefore insufficient to satisfy the “particularity” required by Rule 9(b).

7 Plaintiff’s fraud claim also fails because the only fact to support Plaintiff’s conclusion that  
8 ARC made a promise that it did not intend to keep is that ARC decided not to hire Plaintiff  
9 (assuming for the sake of argument Plaintiff could establish that someone with authority made a  
10 promise on which Plaintiff could justifiably rely that ARC would hire Plaintiff). This is  
11 insufficient to sustain a claim of fraud. “[S]omething more than nonperformance is required to  
12 prove the defendant’s intent not to perform his promise . . . .” *Magpali v. Farmers Group, Inc.*,  
13 48 Cal.App.4th 471, 481 (1996).

14 **C. Plaintiff Has Failed to State A Claim for Negligent Misrepresentation**

15 In his third cause of action for negligent misrepresentation, Plaintiff alleges that  
16 “Defendants’ representations . . . , including plaintiff being told he was to be hired” and other  
17 actions were “negligent and not in good faith.”

18 In order to state a claim for negligent misrepresentation, Plaintiff must allege facts  
19 showing that there was (1) a false representation of a past or existing material fact; (2) made by  
20 the defendant without reasonable ground for believing it to be true; (3) the defendant’s intent to  
21 induce reliance; (4) the plaintiff’s justifiable reliance; and (4) resulting damage to the plaintiff.  
22 See California Civil Code §§ 1572(2) and 1710(2).

23 Plaintiff has failed to state a cause of action for negligent misrepresentation because his  
24 allegations of negligent misrepresentation are too uncertain. Plaintiff has not alleged that ARC  
25 intended to induce reliance on any representation it allegedly made to him, nor has he alleged any  
26 facts from which this conclusion may be drawn. Moreover, there are no allegations, or any facts  
27 to support any allegation, that Plaintiff justifiably relied on a representation by ARC which  
28 caused Plaintiff damage.

Further, only misrepresentations as to a past or existing fact are actionable. There is no claim for promises which are negligently made. *See e.g., Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159. The representations Plaintiff has alleged were made to him are that his conviction would not stop his hire and that he “would be hired.” These statements convey the individual defendants’ intentions to act in the future and therefore cannot form the basis for a negligent misrepresentation claim.

#### IV. CONCLUSION

Plaintiff has failed to state facts sufficient to support a cause of action against ARC for Association Discrimination, Fraud or for Negligent Misrepresentation. Therefore, the Court, having considered the pleadings submitted by the parties and oral argument from counsel, and good cause appearing therefor,

HEREBY ORDERS as follows:

1. ARC’s Motion to Dismiss Plaintiff’s First Amended Complaint is GRANTED in its entirety; and
2. This action is dismissed, with prejudice as to American Red Cross Blood Services Southern California Region, improperly sued as The American Red Cross.

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3. Plaintiff is ordered to pay ARC's costs in the amount of \$\_\_\_\_\_ which it has incurred in connection with defending this action.

DATED: \_\_\_\_\_, 2007

UNITED STATES DISTRICT COURT JUDGE

Submitted by:

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Attorneys for Defendant  
AMERICAN RED CROSS BLOOD SERVICES NORTHERN CALIFORNIA REGION,  
Improperly Sued As The American Red Cross, STEVE BROWN and ROBERT BROWNING



**PROOF OF SERVICE**

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12100 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025-7120. On November 27, 2007, I served a copy of the within document(s): **[PROPOSED] ORDER GRANTING DEFENDANT AMERICAN RED CROSS BLOOD SERVICES SOUTHERN CALIFORNIA REGION'S MOTION TO DISMISS PLAINTIFF BRIAN SETENCICH'S COMPLAINT**



via e-mail.



by placing the document(s) listed above in a sealed envelope and causing postage to be placed thereon, fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.



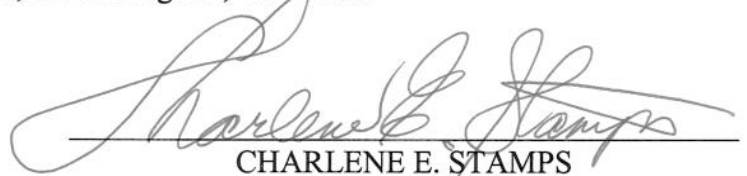
by causing the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 27, 2007, at Los Angeles, California.

  
CHARLENE E. STAMPS